Monongahela Steel Company and Youngstown Steel Corporation *and* United Steelworkers of America, District 15, AFL-CIO-CLC. Case 6-CA-13603

October 29, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On August 28, 1981, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel and the Union filed limited exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge,[2] as modified herein, and to adopt her recommended Order, as so modified.

Contrary to our dissenting colleague, we find appropriate the Administrative Law Judge's remedy that Respondent reestablish operations at its Monongahela plant. We have found, and the Chairman agrees, that Respondent's closure of the Monongahela facility violated Section 8(a)(3) and (1) of the Act. The proper remedy in cases involving discriminatory conduct is the restoration of the *status quo ante* unless the wrongdoer can demonstrate that the normal remedy would endanger its continued viability. This principle is based on the Board's policy that the wrongdoer, rather than the innocent victim, should bear the hardships of the unlawful action. Thus, Respondent has the burden of showing that reestablishment of its Monongahela operation would result in undue economic hardship. *Weather Tamer, Inc. and Tuskegee Garment Corporation*, 253 NLRB 293 (1980); *Smyth Manufacturing Company, Inc.; Beacon Industries*, 247 NLRB 1139 (1980); *R & H Masonry Supply, Inc.*, 238 NLRB 1044 (1978).

Respondent contends that the Administrative Law Judge's remedy would result in "substantial financial burdens." It claims that reestablishment of the Monongahela plant would require a major diversion of funds from the Youngstown plant and would conflict with its commitment to hire employees from the Youngstown area.

We agree with the Administrative Law Judge that Respondent did not show that resumption of operations at Monongahela would threaten Respondent's continued existence. In light of the Administrative Law Judge's findings concerning Lang's continued ownership of the plant, Respondent's retention of almost all the plant's equipment, the maintenance of that equipment by the former plant manager, Leek, the apparent availability of an experienced work force, and the market for Monongahela's product provided by Youngstown's fully operating railroad spike facility, we do not believe that reestablishment of the Monongahela operation would be unduly burdensome to Respondent.

Although our dissenting colleague describes Monongahela's financial condition in some detail, he overlooks the fact that Respondent had sufficient capital to make the necessary improvements at Monongahela and to keep the plant operating. Instead, Respondent chose to use that capital to discharge all of Monongahela's liabilities, including $1.5 million in bank loans which were negotiated in 1979 for 7-year terms, because of the employees' selection of the Union. Indeed, that fact is crucial to the Administrative Law Judge's finding that the closure violated Section 8(a)(3) of the Act, a finding which the Chairman joins us in adopting. As for the Chairman's reliance on Wood's testimony of a 50- to 60-percent product-rejection rate, the record shows that Wood testified without the benefit of any production records and stated that the 50- to 60-percent figure was an "educated guess." Wood's testimony is further undercut by Respondent's failure to furnish any supporting documentation and by evidence that Monongahela experienced a significant increase in sales and demand for its product in the period immediately preceding the closure.

[1] Respondent excepts to the Administrative Law Judge's finding that Monongahela Steel and Youngstown Steel used the same accounting firm, contending that Youngstown Steel used Monongahela Steel's firm solely in connection with a loan application to the Economic Development Association. The record shows that the two companies generally used separate accountants, but this fact does not affect our affirmance of the Administrative Law Judge's finding that Monongahela Steel and Youngstown Steel are a single employer.

The Administrative Law Judge inadvertently referred to Frederick Davis as "Benjamin Davis" in her remedy and recommended Order. She also inadvertently referred to Sec. 8(a)(1) of the Act, instead of Sec. 8(a)(3), in par. 1(b) of her recommended Order. We therefore correct these errors.

[2] We have modified the Administrative Law Judge's recommended Order to correct inadvertent errors and to follow more accurately and remedy the violations found. We have also modified the Administrative Law Judge's notice to conform to our Order.

While agreeing with the Administrative Law Judge that the determination of which employees are entitled to reinstatement and backpay is best left to the compliance stage of this proceeding, we do not adopt her finding that the December 24, 1979, termination dates appearing on G.C. Exh. 53 are related to the nondiscriminatory shutdown of the 24-inch mill department.

Applying the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we agree with the Administrative Law Judge that the nature of Respondent's unfair labor practices warrants the issuance of a broad cease-and-desist provision.

Again, we find that a *status quo ante* remedy would not impose undue hardship on Respondent. In fact, we are ordering Respondent to reestablish the very business arrangement for which it had made predictions of prosperity just days before Monongahela's closure and which was set forth in an application submitted to EDA a week after the shutdown. Furthermore, only this remedy, unlike that proposed by our dissenting colleague, will provide meaningful relief to the victims of Respondent's discriminatory conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set forth in full below, and hereby orders that the Respondent, Monongahela Steel Company and Youngstown Steel Corporation, Glassport, Pennsylvania, and Youngstown, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with plant closure for selecting the Union as their collective-bargaining representative.

(b) Discouraging membership in, or activities on behalf of, United Steelworkers of America, District 15, AFL–CIO–CLC, or any other labor organization, by terminating unit employees or closing business operations because they select a union as their representative or otherwise discriminating against employees in any manner with respect to their terms and conditions or tenure of employment in violation of Section 8(a)(3) of the Act.

(c) Failing and refusing to meet and bargain collectively with the Union as the exclusive collective-bargaining representative of its employees, or unilaterally terminating unit employees and closing business operations without consulting with or notifying the Union and providing it an opportunity to bargain about such proposals or their effects.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Reestablish business operations at its Monongahela plant in Glassport, Pennsylvania, and restore the work previously performed and about to be performed therein.

(b) Offer employment to Frederick Davis, and recall and offer to employees of Monongahela who were terminated as the result of the April 3, 1980, closure immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered by reason of the discrimination against them, with interest, in the manner described in the section of the Administrative Law Judge Decision entitled "The Remedy."

(c) Upon request, bargain with United Steelworkers of America, District 15, as the exclusive representative of Respondent's employees at the Monongahela plant with respect to wages, hours, and other terms and conditions of employment or any proposed changes therein and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at Respondent's Monongahela plant in Glassport, Pennsylvania, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

CHAIRMAN VAN DE WATER, dissenting in part:

I concur in my colleagues' finding that Respondents Monongahela and Youngstown constitute a single employer, and that by threatening employees of Monongahela that it would close the plant if the Union were selected and thereafter closing the plant, without notifying the Union, Respondent violated Section 8(a)(1), (3), and (5) of the Act.[4]

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[4] Contrary to my colleagues, I would find for the reasons set forth in my dissent that the motivating factor in the shutdown was economic and not the advent of the Union.

Where I quarrel with my colleagues is in the proposed remedy. The Administrative Law Judge ordered reestablishment of the Monongahela operation, citing for authority *Weather Tamer, Inc.*, 253 NLRB 293,[5] which held that reestablishment is a proper remedy unless Respondent can show that its financial viability would be endangered by such an order. My colleagues are adopting the remedy recommended by the Administrative Law Judge. On the basis of the facts hereafter discussed, reestablishment of the closed facility appears financially unsound if not impossible and might ultimately result in forcing Respondent—the remaining operating entity, Youngstown Steel—into bankruptcy.

In General Counsel's Exhibit 44, Monongahela's 1980 tax return indicates that the Company had a taxable loss of $932,049 in 1979 and taxable income of $177,566 in 1980. However, that taxable income was not from operations but resulted from a $2 million commission income. Sales of Monongahela for 1980 were $247,663 and the *cost* of goods sold were $622,596 resulting in an operating loss for 1980 of $374,933. There was undisputed testimony by Wood, one of the principal stockholders, that Monongahela's production had a scrap or rejection rate of 50 to 60 percent. He further testified that Monongahela was closed down because it had no money and could not pay utility bills and had to sell scrap in order to meet its payroll. In support of such testimony is the fact that workmen's compensation insurance and health benefit insurance of Monongahela lapsed because of failure to pay premiums. In addition the shareholders of Monongahela and its bank flatly refused to advance additional moneys to Monongahela. Finally, it appears that Monongahela could only be saved by a massive infusion of capital and in view of past operating losses and its difficulty in producing a salable product, such a likelihood was highly improbable. Wood's testimony that Monongahela simply ran out of money is undisputed. He testified that he spent "two-thirds of my time in the latter part of this operation, keeping the gas on, keeping the electric on and for the water company not to turn us off, trying to get supplies into the place, selling scrap so that we could make payroll."

In such a context for this Board to require the Company to reestablish a money-losing operation at Monongahela is incredible and beyond comprehension. Not only would it require Respondent to transfer funds from its Youngstown plant which had received local development loans for the purpose of creating employment for residents of the Youngstown area but it usurps a management function of when and under what circumstances it can continue business. In fact, part of the reason for closing Monongahela was to preserve the viability of Youngstown and to permit termination of Monongahela operations and, in the process, liquidate its outstanding loans.

In view of the recital of the above facts, it may well be that the closure of Monongahela was prompted in substantial part by its financial problems and puts into question the finding of violation herein. However, I am prepared to accept the credibility determinations and the finding that such threats of closing and implementation thereafter of such threats without bargaining was violative of the Act.

In sum, I would limit the remedy to the following. Require Respondent to establish a preferential hiring list for employees formerly employed by Monongahela and in the event Monongahela or an alter ego thereof again resumes operations, they shall be given preference for hire. With respect to Youngstown, it too should be required to utilize the Monongahela preferential hiring list in the event it needs employees of such skills. Since Youngstown is approximately 100 miles from the Glassport, Pennsylvania, site of Monongahela, it is unlikely that many employees would accept employment at Youngstown in any event. To the extent Youngstown Steel Corporation is obligated to hire from the Monongahela preferential hiring list, such hiring should be reconciled with its local development loans and the commitment to hire local Youngstown people by alternating hiring between individuals on the Monongahela list and Youngstown area residents.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT restrain or coerce our employees in the exercise of their protected rights by threatening them with plant closure for se-

[5] I would find that the reestablishment order here would threaten Respondent's financial viability even under *Weather Tamer, Inc., supra*. Contrary to the *Tamer* case, I find that shutdown here was motivated by economic conditions and further that undisputed testimony on Respondent's financial condition establishes without question that reestablishment of a plant which was losing money is unwarranted, financially unsound, and would threaten Respondent's economic viability.

lecting the Union as their collective-bargaining representative.

WE WILL NOT discourage membership in or support for United Steelworkers of America, District 15, AFL-CIO-CLC, or any other labor organization, by terminating employees and closing the plant because they select or support a union as their representative, or otherwise discriminate against them in any manner in respect to their tenure, or any terms and conditions of employment.

WE WILL NOT fail or refuse to bargain collectively with United Steelworkers of America, District 15, AFL-CIO-CLC, as the exclusive bargaining representative of the production and maintenance employees at our Monongahela plant in Glassport, Pennsylvania, over the terms and conditions of employment nor unilaterally effect any changes in such terms and conditions without notifying and providing the Union an opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reestablish business operations at our Monongahela plant in Glassport, Pennsylvania, and restore the work formerly performed and about to be performed there by the terminated unit employees.

WE WILL offer employment to Frederick Davis, and recall and offer to the unit employees who were terminated as the result of our closure of Monongahela Steel Company, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed by them, and WE WILL make them whole for any loss of pay suffered by reason of the discrimination against them, with interest.

WE WILL, upon request, recognize and bargain with United Steelworkers of America, District 15, as the exclusive bargaining representative of the production and maintenance employees of Monongahela Steel Company, Glassport, Pennsylavania, and, if an understanding is reached, embody such understanding in a signed agreement.

MONONGAHELA STEEL COMPANY AND YOUNGSTOWN STEEL CORPORATION

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: This case was heard in Pittsburgh, Pennsylvania, on May 20, 21, and 22, 1981, based on charges filed on July 8 and October 2, 1980, leading to a complaint which issued on October 3, 1980, as amended on May 12, 1981. The gravamen of the complaint is that on or about June 30, 1980, Respondent, Monongahela Steel Company (hereinafter Monongahela) was closed for discriminatory reasons without providing the United Steelworkers an opportunity to bargain about the decision to close, or its effects, in violation of Section 8(a)(1), (3), and (5) of the Act, and, further, that Respondent Youngstown Steel Corporation (hereinafter Youngstown) and Monongahela constituted a single employer. Respondents filed a timely answer denying that a legal relationship existed between the two enterprises or the commission of any unfair labor practices.

Issues

The principal issues in this case are:

(1) Whether Monongahela and Youngstown comprise a single employer within the meaning of the Act.

(2) Whether Respondents violated Section 8(a)(1) and (3) of the Act by terminating Monongahela's employees and closing that facility for discriminatory reasons.

(3) Whether Respondents violated Section 8(a)(1) and (5) of the Act by failing to notify and bargain with the Union as to the decision to close the Monongahela plant and the effects of that decision.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the post-trial briefs submitted by counsel for the General Counsel (hereinafter the General Counsel) and for the Respondent, I find as follows:

FINDINGS OF FACT

I. JURISDICTION

Prior to June 30, 1980, Respondent Monongahela, a Pennsylvania corporation with its place of business in Glassport, Pennsylvania, was engaged in the manufacture and nonretail sale of steel reinforcement rods. During the 12-month period ending August 31, 1980, Monongahela, in the course and conduct of its operations, purchased and received at its Glassport facility, products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

At all material times herein, Respondent Youngstown, an Ohio corporation with its place of business in Youngstown, Ohio, was and is engaged in the manufacture and nonretail sale of railroad spikes. During the 12-month period ending August 31, 1980, Youngstown Steel, in the course and conduct of its operations, purchased and received at its Youngstown, Ohio, facility, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio.

Accordingly, I find that Monongahela was and has been at all material times an employer, and Youngstown

is now, and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The United Steelworkers of America, District 15, AFL–CIO–CLC (hereinafter the Union), is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Relationship Between Monongahela and Youngstown*

Monongahela was incorporated on December 11, 1978, and its total capital stock divided equally among the three shareholder-directors: Charles J. Lang, William P. Snyder, and Andrew K. Wood. From November 26, 1979, on, Wood served as president and treasurer of the Corporation; Rita Kelly, who was an associate counsel for both Respondents, was designated secretary.

Lang played an instrumental role in the formation of Monongahela. Initially, he purchased a portion of a defunct facility in Glassport, Pennsylvania, as well as the machinery contained therein. On February 1, 1979, he leased the building to Monongahela. In addition, he held $75,000 notes from Wood and Snyder for a one-third interest in the machinery which they then contributed to Monongahela in return for common stock. Further, Lang provided $90,000 as a start-up loan to the Corporation. He also engaged Ronald Garmey as a consultant to Youngstown Steel Corporation, but through Garmey's efforts, Monongahela obtained a $1,275,000 loan repayable over 7 years with a 90-percent guarantee from the Economic Development Agency of the United States Department of Commerce (EDA) and another $225,000 loan from Pittsburgh Countywide Corporation.

Monongahela leased administrative office space in a building owned by Lang in Groveton, Pennsylvania; the same building which currently houses Youngstown's administrative quarters. Both Corporations utilized the same legal counsel and accounting firm.[1]

Monongahela began operations in March 1979. From that date until its closure in early April 1980, Respondent purchased steel ingots and billets from which it produced three-eighths and one-half inch steel reinforcing bars used in the construction trade to structually strengthen concrete.

Respondent Youngstown was incorporated October 1, 1979. Lang and Wood were the major investors, each owning 40 percent of the nonvoting shares, with the remaining 20 percent held by two additional shareholder-directors, Garmey and Francis McHugh. Lang, who is chairman of the board, controls 100 percent of the voting stock. Wood serves as Youngstown's president and its sole salesman, as he was for Monongahela; Garmey and McHugh are both vice presidents and Kelly again is secretary and a board member. By virtue of their relationship as "controlled corporations"; that is, businesses where no more than five persons possess at least 80 percent of the voting stock, Respondents were able to claim certain tax advantages on their 1980 Federal corporate tax return.[2]

Youngstown was formed for the express purpose of establishing a mini steel mill which would manufacture a variety of products including tube rounds, railroad track spikes and tie plates, joint bars, pipe spigots, and bar-sized shapes. Toward this end, Respondent leased portions of the former Jones and Loughlin steel works in Youngstown, Ohio, and purchased the equipment housed there. Garmey succeeded in obtaining from the EDA a direct $10 million loan repayable over 10 years. The loan application was filed with the EDA on April 10, 1980, and approved on May 29. Youngstown began producing railroad track spikes at its facility in Struthers, Ohio, in March 1980, which is, to date, the only facet of the Youngstown project that is operational.[3]

Prior to Monongahela's closure, Respondents entered into a number of transactions which suggest that a preferred relationship existed between them.

For example, in December 1979, Respondents executed an agreement which empowered Monongahela to act as sales agent for Youngstown in the acquisition of certain large pieces of machinery, for a finder's fee of $500,000 and an additional 50-percent commission on any resale that might occur.

Through the first 4 months of 1980, Youngstown also loaned Monongahela interest-free funds in amounts of $100,000, $25,000, and $63,000. These sums eventually were deducted from the fee Monongahela earned in locating equipment for Youngstown. During this same period of time, Monongahela purchased supplies from Calumet Steel Corporation for Youngstown's use. Garmey explained that Calumet insisted on this arrangement since Youngstown had not yet established its own credit. Additionally, Monongahela's plant manager, James Leek, with the assistance of an employee, made frequent trips to Youngstown to collect, at no cost, surplus materials for use at the Glassport factory.

What promised to be the most significant nexus between the two companies ripened but never came to fruition. In the application which was submitted to the EDA on April 10, 1980, a week after Monongahela's closure, Youngstown disclosed that Monongahela would purchase all of its raw material requirements, that is 50,000 tons of steel billets annually from Youngstown. This amount would represent Youngstown's total billet output. In return, Monongahela was to convert the billets into five-eighths-inch steel squares and ship its entire product to Youngstown for use in its manufacture of railroad spikes.

This relationship was conceived some months before Youngstown actually submitted its formal proposal to the EDA. Thus, in January 1980, Garmey described the projected exchange to the Union's staff representative, John DeScuillo. Leek also mentioned to an employee, Dan Miller, that Monongahela would be producing squares for Youngstown's railroad spike stamping machines and had the ability to do so. Again in May,

[1] Although Wood testified that different accountants were employed by each Corporation, Youngstown's application to EDA states otherwise. (See G.C. Exh. 39.)

[2] See 26 U.S.C. §§ 1561, 1563(a)(2).

[3] Youngstown also obtained additional facilities in the nearby Ohio community of Campbell.

Garmey described the proposed arrangement to the Union's lawyer, Ronald Zera.[4] At the hearing in this matter, Garmey further explained that the EDA had reviewed and tentatively approved the terms of the loan prior to the formal submission of the application.

Apart from the paperwork described above, Respondents took some concrete steps to convert the plan into a reality. Thus, in December, Monongahela succeeded in putting billets received from Youngstown through the 24-inch mill for a trial run. On February 15, 1980, Monongahela invoiced Youngstown for $100,000 to "obtain and prepare rolls and rolling mill to supply sharp cornered square steel stock suitable for track spike manufacture." Further, on March 4, 1980, Wood ordered 4,400 tons of steel billets to cover Monongahela's requirements from April through December 1980. Included in this transaction were orders for 1,500 tons of billets whose end use was suitable for the production of railroad track spikes.

With Monongahela's closure, the plan to produce the five-eighths-inch squares could not materialize. Instead, Youngstown's railroad spike plant, which commenced production in March 1980, contracted with several independent companies for the requisite supplies.

B. *Monongahela's Employees Organize*

On March 8, 1980, on or about the time that Youngstown commenced production, Monongahela employees elected the United Steelworkers as their collective-bargaining representative by a wide margin. Remarks made by Plant Manager Leek prior to the election indicate that Respondent was less than receptive to the unionization of its work force. At Monongahela's Christmas party on December 18, 1979, employee Richard Bortak stated that Leek, in Wood's presence, stated that in the event a union entered the plant, Lang would immediately "shut the doors." Wood testified, however, that he did not overhear this remark or signify his assent to its contents, as Bortak alleged. In February 1980, after employee Miller advised Leek that almost all of the employees had signed union authorization cards, Leek retorted in no uncertain terms that Lang would "slam the door shut on Monongahela." Later that month, Leek again warned Miller that Lang would throw the Union out and shut the plant before allowing a union in.

The first and what became the only meeting to negotiate a collective-bargaining agreement took place on March 31, 1980, with Wood, Leek, and Garmey representing Respondent. The negotiations focused primarily on such matters as the method of recalling laid-off employees, payment for the approaching Good Friday holiday, and transferring to a biweekly pay system as a cost-saving measure. Although Wood mentioned that the Company had serious financial difficulties and was short of operating capital, there was no reference to a contemplated plant closure. In fact, Wood remarked that Monongahela would improve their product by obtaining a better grade of steel billet, and ultimately would operate with three shifts requiring 125 to 130 employees. The parties agreed to meet again in 2 weeks, but no further sessions materialized.

C. *Monongahela's Closure*

In late December 1979, production on the 24-inch rolling mill at Monongahela was halted and three of the employees assigned to that equipment were laid off. Nevertheless, Monongahela's employees were receiving repeated messages of a bright future for the Company. In December 1979, Wood told employee Bortak that business was booming and there was a large market for the product. The following month, Leek stated to a group of employees that there were many orders on hand and a big market for their product. Again at the parties' March 31 negotiating session, Wood repeated that it was going to be a booming industry once everything got going.

A record of the orders placed with Monongahela for 1979 and the first 3 months of 1980 lend credence to Leek's and Wood's optimistic expressions. In the first 3 months of 1980, sales were approximately $205,183 whereas total sales in the preceding 9 months amounted to $106,035. Further, the formation of Youngstown bringing with it a guaranteed market for Monongahela's wares, promised even greater success and stability for both enterprises.

In spite of these positive signs, 3 days after the parties' collective-bargaining meeting, the plant was shut down and the employees were laid off for what they were told was a temporary shut down to repair the damaged 18-inch rolling mill.

In early April, Miller asked Wood if the plant would reopen or whether he should seek other employment. Wood replied that they hoped to obtain a loan in early or mid-June which would permit a recall the following month. In mid-April, Leek advised Miller that the work force would be recalled when the repairs were completed. Throughout May and June, Union Business Agent DeScuillo made repeated but unsuccessful efforts to arrange another collective-bargaining meeting. On one occasion on or about June 26, Wood did contact DeScuillo, told him the plant might start up in a few weeks or by the end of the summer, and assured him Monongahela had no serious financial problems. Throughout this same period of time, union counsel, Zera, had several conversations with Garmey who explained that, although employed by Youngstown, he was working for Monongahela and reviewing its books as a favor to Lang. Zera testified without contradiction that Garmey alluded to a cash flow problem but assured him that Monongahela was a viable operation, with money on hand for its products, and a future which tied its fate to that of Youngstown's.

In July, after being advised that a June 29 newspaper advertisement offered the Monongahela property for sale, Zera again called Garmey for an explanation. Garmey knew nothing about the proposed sale. However, in a subsequent phone call a week later, Garmey advised Zera that Monongahela's directors had voted to

[4] Zera testified that Garmey indicated Monongahela would be a "captive" to Youngstown. Garmey did not deny the substance of the conversation; only that he had not used the word "captive." I do not regard this as contradiction of Zera's testimony; rather, I conclude that Zera used the word "captive" figuratively to characterize the thrust of Garmey's remarks.

close the facility, admitting that it was because of the union-caused labor problems and a matter involving an alleged discriminatee.[5]

Wood testified, however, that the plant closure on April 3 and its final dissolution on June 30, 1980, were attributable solely to serious financial difficulties stemming from Monongahela's incapacity to produce an acceptable finished product.

As Wood explained, Monongahela's equipment was old and not readily adaptable to the process of producing reinforcement bars. To remedy this situation, three experts were consulted, each of whom recommended revisions to the machinery's pass design systems, thereby requiring some cessation in production. Wood further asserted that the scrap or rejection rate was as high as 50 or 60 percent whereas tolerable ceilings for scrap should have been no more than 10 percent.

As a result, Wood testified that Monongahela was experiencing a cash flow problem which caused increasing difficulties in paying suppliers and, in April 1980, Monongahela was unable to meet its payroll. Its liabilities, including the $1,275,000 and $225,000 loans exceeded its assets, and efforts to obtain additional funds through loans from a bank or the shareholders proved unavailing. Accordingly, for these reasons, Respondent contends that on June 23, 1980, the Corporation was dissolved and a plan of voluntary liquidation adopted.

Youngstown played an integral role in Monongahela's dissolution. Although Wood testified that Monongahela's problems would be resolved by a massive infusion of capital, the $2 million finder's fee and commission which the Corporation earned from the purchase and resale of certain machinery for Youngstown was not dedicated to its survival. Instead, these funds were used to erase a substantial portion of its debts, including the two outstanding bank loans. Wood was particularly concerned that Monongahela die an honorable death so that EDA, which had approved but not completely funded the loan to Youngstown, would have no reason to view his financial and managerial skills adversely. Monongahela's rental lease with Lang was formally canceled without penalty on June 30. On the same date, Monongahela's tangible property was sold to Youngstown for $1,237. This sum, too, was used to liquidate the Corporation's outstanding debts.[6] Youngstown then contracted with J. L. Enterprises (a company formed by James Leek) to maintain and secure the equipment which remained intact at the Monongahela plant.

Through these measures, Monongahela's assets came into the possession of either Lang or Youngstown. To date, there has been no sale of the real or personal property. However, shortly before the hearing in this matter, Youngstown entered into preliminary discussions with the Barholt Corporation regarding its leasing the former Monongahela premises and producing, among other things, five-eights-inch squares for Youngstown's use in its railroad track spike operation. Wood acknowledged that Barholt would need about 17 workers to start such an organization.

Discussion

A. *Respondents Are a Single Employer*

It is well settled that a determination of single employer status will turn on the presence of (1) common ownership, (2) common management, (3) centralized control of labor relations, and (4) integration of operations, between two or more nominally independent employers. *Radio & Television Broadcast Technicians Local Union 2364, IBEW, AFL–CIO* v. *Broadcast Service of Mobile, Inc.*, 379 U.S. 812 (1964); *Don Burgess Construction Corp., d/b/a Burgess Construction*, 227 NLRB 765, 773 (1977), enfd. 596 F.2d 378 (9th Cir. 1979). Although no single criterion is controlling, nor must all four be present, the last three criteria listed above generally are accorded greater weight. *Don Burgess Construction Corp., supra* at 774.

There is no question that the first element, common ownership, is present here. Lang and Wood were holders of two-thirds of Monongahela's stock and four-fifths of Youngstown's. Lang contributed $90,000 to Monongahela, as well as a substantial portion of the machinery. It leased the premises which housed the Monongahela factory and the administrative offices used by both Respondents in Groveton. Lang learned of the availability of the former Jones and Loughlin facility, and holds all the voting stock in Youngstown. He was instrumental in locating a major piece of equipment for Youngstown and he and Wood were responsible for finding and reselling machinery which inured to Monongahela's benefit. These two men clearly were the effective owners and financial satraps of both Corporations. See *S. L. Industries, and Extruded Products Corp.*, 252 NLRB 1058 (1980); *Key Coal Company*, 240 NLRB 1013, 1017 (1979).

Denying that they comprise a single entity, Respondents cite a series of cases in which the Board refused to find single employer status where there was little more than common ownership binding two or more companies.[7] Such cases would, of course, be persuasive if common ownership or financial control was the only unifying link between Youngstown and Monongahela. But Respondent's reliance on these cases is misplaced for the evidence is sufficient to establish the other three elements of a single employer relationship are present here.

Thus, the record indicates that financial power brought with it a lion's share of control over managerial and labor relations policy. Wood and Lang were on the boards of each Company. As president of both Corporations, Wood entered into and executed agreements on their behalf. He was their principal purchaser of materials as well as their sole salesman. It was Lang who sought Garmey's services and who requested Garmey to

[5] Monongahela was charged with violating Sec. 8(a)(1) by refusing to hire Frederick Davis because of his involvement in concerted activity. A decision, issued on June 30, 1980, found that the Company had engaged in an unfair labor practice. (See JD–392–80.) Garmey did not deny these statements; he simply could not recall them. I therefore credit Zera's recollection of this conversation for as a labor lawyer he was bound to be struck by the legal significance of Garmey's admissions.

[6] Monongahela intends to pay its only outstanding debt, a $22,000 tax bill, to the Commonwealth of Pennsylvania with the proceeds of an $18,000 claim in bankruptcy against a bankrupt corporation.

[7] See, e.g., *Gerace Construction, Inc., and Helper Construction Company, Inc.*, 193 NLRB 645 (1971); *Piedmont Wood Products Co., Inc.*, 156 NLRB 151 (1965); *Western Union Corporation*, 224 NLRB 274 (1976).

devote his attentions to Monongahela while on Youngstown's payroll. Although different plant managers may have directed the day-to-day tasks within each plant, the authority for critical decisions affecting the employees—how many shifts would operate, when and how many employees would be laid off or hired, and whether a plant would close—apparently were made by these two key members of a substantially interlocking directorate. Significantly, Leek referred to Lang as the person who would close the plant in the event of unionization. It was Wood who served as the chief management negotiator at the collective-bargaining meeting for Monongahela employees. See *S. L. Industries, Inc., supra.* Indeed, at the hearing, Wood conceded that the boards of directors of both Corporations were in charge of operations, including labor relations policy.

The financial relationship between the two Corporations further reveals they shared a community of interests. It can hardly be said that Respondents were engaged in arm's-length transactions when Youngstown made interest-free advances to Monongahela and released surplus goods without cost. The arrangement which allowed Monongahela to realize $2 million for finding and reselling equipment for Youngstown would not have been executed between strangers, nor is it likely that Monongahela's lease with Lang would have been canceled without penalty.

Were it not for Monongahela's untimely demise, it is clear that the Glassport and Struthers plants would have functioned as highly integrated components of a unified venture. Evidence of their joint intent stems not only from the proposals set forth in Youngstown's application to the EDA or from the comments which Garmey and Leek made, but also from concrete steps taken by Monongahela in ordering materials needed to produce squares for Youngstown and billing it for that production.

Respondent argues that no interdependence existed because Monongahela's product was, in fact, a reinforcing bar used by concrete installers, whereas Youngstown manufactured railroad spikes with an entirely separate work force, possessing different skills in a different location and for different customers. Respondent's argument is flawed, however, for it concentrates on what Monongahela produced prior to its closure and ignores what would have been manufactured had it been permitted to survive. Respondent's contention that the plant's operations were not integrated might deserve some consideration if Monongahela's closure was solely a matter of economic necessity. However, since I find below that Respondent purposely brought about Monongahela's demise for discriminatory reasons, Respondent cannot be heard to complain now that the Corporations were not interrelated, for to honor such an argument would reward Respondent for its own wrongdoing. In sum, on the facts presented here, I conclude that Monongahela and Youngstown, at all material times, constituted a single employer.

B. *Respondent's Threatened Plant Closure*

On several occasions, Leek warned employees that Lang would close the plant rather than permit the Union to intrude. Wood testified that he never overheard nor approved of such a comment. However, Respondent failed to produce Leek as a witness or account for his nonappearance. In fact, it did not deny that Leek made such remarks; rather, that he was unauthorized to do so. However, if an employee such as Leek is cloaked with apparent authority to speak for Monongahela, it is not necessary that Wood have actual knowledge or approve his statements for them to be binding. See *Jay's Foods, Inc.* v. *N.L.R.B.*, 573 F.2d 438, 444–445 (7th Cir. 1978). Accordingly, by Leek's threatening that Lang would close the plant if the employees unionized, Respondent violated Section 8(a)(1) of the Act. See *Weather Tamer, Inc. and Tuskegee Garment Corporation*, 253 NLRB 293 (1980); *Hood Industries*, 248 NLRB 597, 600 (1980); *Douglas Lantz d/b/a and/or a/k/a Alcan Forwarding Co.*, 235 NLRB 994, 998 (1979), enfd. 607 F.2d 290, 295 (9th Cir. 1979).

C. *Monongahela's Closure Was Discriminatory*

Until confronted with the duty to bargain with the Union, Respondent's agents, Wood, Leek, and Garmey, pointed to a prosperous and stable future for Monongahela. Although Wood testified at length, he never denied making the glowing predictions about Monongahela's prospects attributed to him. Nor did Respondent contest the figures placed into evidence by the General Counsel which showed that the income realized from the sale of Monongahela's product increased significantly during the first 3 months of 1980. Yet, less than a week after the first negotiating session took place, while orders were still pending and with a $2 million payment forthcoming, Monongahela abruptly and without forewarning ceased doing business. These factors alone warrant an inference that Respondent disbanded the Corporation for discriminatory reasons. This inference becomes a virtual certainty when coupled with threats that Lang would close the plant rather than tolerate the Union, and Garmey's admission that labor problems led to the closure.

Respondent contends that Monongahela was dissolved solely because it was incapable of producing an acceptable product and, therefore, was not generating a cash flow sufficient to pay its bills. A close examination of Respondent's evidence leaves little doubt that its decision was motivated not by economic considerations but by union animus.

It is difficult to understand how Respondent can maintain that its product was substandard when the earnings from sales for 3 months in 1980 reflected a dramatic increase of over $99,000 compared to the total sales for the preceding 9 months. Moreover, Respondent failed to explain why, if Monongahela were doomed to close in April, an order was placed in March for enough billets to fill all of the Corporation's needs to the end of the year. Further, Milton Manufacturing and U.S. Metal were Monongahela's major customers from September 1979 through March 1980. If over 50 percent of Monongahela's output were scrap, these companies would not have continued as consistent customers, with expanded demands for Monongahela's products. In contrast to the record of sales and orders produced by the General

Counsel, Respondent relied solely on testimony that Monongahela was failing, that the machinery was inadequate, and that 50 percent of its production was below tolerable norms. By failing to furnish any real evidence supporting these claims, when documentation should have been within its possession and control, an inference arises that had such records been produced, they would not have substantiated Respondent's contentions. *Pacific Coast International Meat Co.*, 248 NLRB 1376, 1381–82 (1980); *Fred Branch d/b/a B & L Plumbing*, 243 NLRB 1016, 1022 (1979); *Colorflo Decorator Products, Inc.*, 228 NLRB 408, 417 (1977).

Nevertheless, Respondent insisted that Monongahela's machinery was ill-adapted to producing reinforcing rods. To support this contention, Wood pointed out that he had to consult with three specialists, each of whom recommended that the machinery's pass systems be redesigned. However, their recommendations only prove that the machines could be and were, in fact, improved. At no time was it suggested that the consultants urged abandoning the equipment. Even had new rolling mills been required, Wood estimated their cost at $200,000. Surely this sum was available from the $2 million Monongahela earned. Yet, no reason was offered why its finders fee and commission could not have been used for operational purposes rather than to discharge all of Monongahela's debts, particularly since Wood indicated that what Monongahela needed was a massive infusion of capital. Moreover, there was no evidence that the banks were seeking immediate payment on the loans which were negotiated for 7-year terms.

Given the defects in its case, Respondent plainly failed to meet its burden of proving that it would have pursued the same course on April 3 were it not for its hostility to the employees' union activity. Therefore, I am convinced that the closure of Monongahela and consequent termination of the employees violated Section 8(a)(1) and (3) of the Act. See *Weather Tamer, Inc., supra* at fn. 2; *Smythe Manufacturing Company, Inc., Beacon Industries*, 247 NLRB 1139 (1980).

Respondent suggests that under *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), plant closure is permissible absent a showing that the purpose and effect of the closure was to chill unionism at any of the employer's remaining plants. However, the Supreme Court excepted from the reach of its decision, situations analogous to the instant case "where a department is closed for antiunion reasons but the work is continued by independent contractors." *Id.* at 272–273, fn. 16. Had Monongahela been permitted to survive, it now would be functioning as an integrated arm or department of Youngstown and Youngstown would not be purchasing its stock from independent suppliers. Accordingly, *Darlington* is inapplicable to the circumstances present here. Compare, *Hood Industries, Inc., supra* at 600–601 and *Smythe Manufacturing Co., Inc., supra*, with *Electrical Products Division of Midland Ross Corporation*, 239 NLRB 323 (1978), enfd. 617 F.2d 977 (3d Cir. 1980).

D. *Respondent Unlawfully Refused To Bargain*

Respondent makes little pretense that it advised the Union of its decision to close Monongahela nor did it present any justification for its failure to do so. To the contrary, managements' conduct at the March 31 collective-bargaining meeting was calculated to mislead the most reasonable mind into believing that Monongahela would not only survive, but thrive. Thus, although Wood mentioned that Monongahela was encountering financial problems at the meeting, at the same time, he participated in an extended discussion of recall rights for laid-off employees, payment for a forthcoming holiday, and suggested that a growing market for the product would require three shifts. In addition, he promised the purchase of a better grade of steel as a means of reducing some of the defects in production and Garmey proposed a biweekly payment plan to alleviate cash flow problems. In other words, cures for Monongahela's ills were at hand. Wood's generalized comments about capital outlay shortages fall far short of giving notice that a decision to close the plant was under consideration no less a *fait accompli*, 3 days later. For months after the closure, Respondent fostered the impression that the plant soon would reopen. Not until several weeks after the Union inadvertently discovered that the installation was for sale did Respondent finally acknowledge its decision to close was irrevocable. The secrecy with which Respondent shrouded its intentions to cease operations further demonstrates its discriminatory motivation.

In such circumstances, Respondent's failure to meet and bargain with the Union after March 31 and its unilateral action in closing Monongahela without notifying or consulting with the Union about this decision or its effects on the employees, constitute violations of Section 8(a)(1) and (5). See *Weather Tamer, supra; Hood Industries, Inc., supra* at 601. Compare *First National Maintenance Corp.* v. *N.L.R.B.*, 152 U.S. 666 (1981), where the Supreme Court held that a partial closing for economic reasons is not a mandatory subject of collective bargaining, but recognized that an employer "may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision 'purely economic.'"

CONCLUSIONS OF LAW

1. Respondent Youngstown Steel Corporation and its affiliate Monongahela Steel Corporation comprise a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, District 15, AFL–CIO–CLC, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees that Monongahela would be closed in the event they selected the Union as their collective-bargaining representative, Respondent violated Section 8(a)(1) of the Act.

4. By discriminatorily terminating employees by closing the Monongahela plant on April 3, 1980, because they selected the Union as their representative, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By failing and refusing to meet and bargain collectively with the Union after March 31, 1980, and by unilaterally closing the plant on April 3 without notifying

the Union and providing it with an opportunity to bargain about the closure or its effects, Respondent violated Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In addition, having found that Respondent was motivated by discriminatory considerations in terminating bargaining unit employees and closing the Monongahela plant, I shall recommend that Respondent resume operations at its Glassport facility. In concluding that this remedy is necessary and appropriate, I rely on the Board's view that a restoration of the *status quo ante* is required unless such a remedy causes undue economic hardship. Compare, *Weather Tamer, Inc., supra* at fn. 3, with *Great Chinese American Sewing Company*, 227 NLRB 1670 (1977). The Board stressed in *Weather Tamer* that "the wrongdoer, rather than the innocent victim, should bear the hardships of the unlawful actions . . . unless the wrongdoer can demonstrate that its continued viability would be endangered." *Id.* I find Respondent has presented no evidence that a reopening of Monongahela and a recall of unit employees would be impractical, burdensome, or jeopardize its continued viability.

As discussed above, Respondent's insistence that Monongahela could not produce an acceptable product simply was not substantiated. Obviously, if a week before this hearing Respondent was prepared to purchase material for railroad spikes from Barholt which would use the same machinery it claimed was inadequate, there is no reason why Respondent's former employees cannot do the same work. Moreover, the plant is owned individually by Lang and almost all of the machinery and equipment which Youngstown possesses is intact in the Glassport facility. Further, Youngstown has engaged Leek to maintain the machinery in good working order. Thus, Respondent has no need to find another facility or invest in new machinery as was required in *Weather Tamer, supra* at fn. 2. The former plant manager has maintained a relationship with Youngstown and an experienced work force is apparently available. Respondent's administrative offices remain in Groveton, Pennsylvania, and are more accessible to the Monongahela facility than they are to the plant in Youngstown. Further, Youngstown's railroad spike facility is fully operational and therefore would provide a reliable market for Monongahela's entire production of five-eighths-inch squares. In fact, as Wood acknowledged, the proposed reciprocal relationship between Monongahela and Youngstown would be a benefit, not a burden, to Respondent.

I also will recommend that Respondent offer employment to Benjamin Davis pursuant to the decision in JD-392-80[8] and reinstate those employees who were unlawfully terminated by virtue of the plant's shut down on April 3, 1980, and make them whole for any loss of earnings and other benefits resulting from their discharges by paying to them a sum of money equal to the amount each normally would have earned as wages and other benefits from the date of the discharge to the date on which reinstatement is offered, less net earnings during that period. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9] The General Counsel alleges that all employees identified on Exhibit 53 should be reinstated. However, this document lists termination dates ranging from December 24, 1979, to July 6, 1980. According to Bortak's testimony, however, the shut down of the 24-inch mill in December was due to economic reasons. Therefore, I do not find that the General Counsel has established that the December 24 layoffs were discriminatorily motivated under Section 8(a)(3) of the Act. Apart from the employees terminated on December 24, the record is unclear as to which employees other than those laid off on or after April 3, 1980, were unlawfully discharged as a consequence of Respondent's failure to reopen the Monongahela plant. Therefore, the question of which of those employees are entitled to reinstatement and backpay is best left to the compliance phase of this proceeding. It is noteworthy, however, that Wood estimated Barholt would need 17 employees to recommence operations.

It is further recommended that Respondent be ordered to bargain with the Union about terms and conditions of employment or any changes in such matters, with respect to the employees in a bargaining unit of: all production and maintenance employees including group leaders employed by the Employer at its Glassport, Pennsylvania, facility; excluding all office clerical employees, technical employees and guards, professional employees and supervisors as defined in the Act, and, if an understanding is reached, to embody such understanding in a signed agreement.

In view of the seriousness of Respondent's violations, I recommend that Respondent be ordered to cease and desist from in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.[10]

Because the Monongahela facility is closed, the posting of the appended notice is unlikely to be observed by the unit-employees other than those who may have been retained as part of a security and maintenance force. Therefore, I shall recommend that a copy of the notice be mailed to each member of the bargaining unit.

[Recommended Order omitted from publication.]

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[8] The parties stipulated that Davis had not waived his reinstatement rights.

[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[10] *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).